



August 6, 1999

Mr. David Mendez
Bickerstaff, Heath, Smiley, Pollan, Kever & McDaniel, L.L.P.
1700 Frost Bank Plaza
816 Congress Avenue
Austin, Texas 78701-2443

OR99-2201

Dear Mr. Mendez:

You ask whether certain information is subject to required public disclosure under chapter 552 of the Government Code. Your request was assigned ID# 126541.

The Austin Independent School District (the "district"), which you represent, received a request for the following information:

1. The Official Attendance records of Reagan High School for the school years 1997-1998 and 1998-1999;
2. "Bubble" Attendance Sheets for all teachers at Reagan High School for the school years 1997-1998 and 1998-1999;
3. All documents from and between Reagan High School and/or Austin I.S.D and the Travis County Attorney General's Office [sic] regarding attendance at Reagan High School;
4. The complete personnel files of teachers/staff at Reagan High School with perceived actual disabilities;
5. All memos, reprimands and/or other written documentation relating to teachers who have submitted grade books and attendance in an untimely manner;

You claim that the information requested in items 1, 2, 3, and 5 is excepted from disclosure under sections 552.101 and 552.103 of the Government Code. You relate that no

information exists that is responsive to item 4. You have submitted to this office for review, a representative sample of the responsive information.¹ We have considered the applicable exceptions and reviewed the submitted information.²

Section 552.103(a), the “litigation exception,” excepts from disclosure information relating to litigation to which the state or a political subdivision is or may be a party. To secure the protection of section 552.103(a), a governmental body has the burden of providing relevant facts and documents to show that (1) litigation is pending or reasonably anticipated, and (2) the information at issue is related to that litigation. *Heard v. Houston Post Co.*, 684 S.W.2d 210 (Tex. App.--Houston [1st Dist.] 1984, writ ref’d n.r.e.). To demonstrate that litigation is reasonably anticipated, the governmental body must furnish *concrete* evidence that litigation involving a specific matter is realistically contemplated and is more than mere conjecture; the mere chance of litigation will not establish the litigation exception. Open Records Decision No. 452 at 4 (1986). In this case, you contend that the subject information relates to a pending teacher non-renewal hearing. You contend that this hearing constitutes litigation to which the subject information relates. This office has held that contested cases conducted under the Administrative Procedure Act, chapter 2001 of the Government Code, (the “APA”), are considered litigation under section 552.103. Open Records Decision No. 588 at 7 (1991). You contend that application of section. 21.207 of the Education Code places the subject hearing in a similar position. That statute provides in relevant part:

(b) The hearing must be conducted in accordance with rules adopted by the board. The board may use the process established under Subchapter F.

(c) At the hearing, the teacher may:

- (1) be represented by a representative of the teacher’s choice;
- (2) hear the evidence supporting the reason for nonrenewal;
- (3) cross-examine adverse witnesses; and
- (4) present evidence.

¹We assume that the “representative sample” of records submitted to this office is truly representative of the requested records as a whole. *See* Open Records Decision Nos. 499 (1988), 497 (1988). This open records letter does not reach, and therefore does not authorize the withholding of, any other requested records to the extent that those records contain substantially different types of information than that submitted to this office.

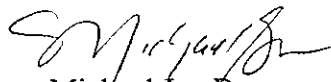
²You relate that a court order prohibits the release of certain responsive information. You argue that this information is excepted by section 552.101 of the Government Code. Such information is more properly addressed under section 552.107(2).

You relate that the rules of the board require that all information to be heard be exchanged five days before the hearing, and that "[t]here is no other provision for discovery." Given the language of the statute and your assertions, we conclude that the non-renewal hearing is not a forum that parallels hearings conducted under the APA. Therefore, you have not demonstrated that litigation is pending or is reasonably anticipated. The subject information may not be withheld under section 552.103(a) of the Government Code.

Section 552.107(2) of the Government Code excepts from public disclosure information when "a court by order has prohibited disclosure of the information." You relate that the district has been served with a subpoena. Although you do not provide the controlling language of the subpoena itself or the documents requested by the subpoena, you represent that the district "is precluded by court order from disclosing the information requested in item 3." Our office must rely on the good faith representations of a governmental body. *See generally* Open REecords Decision No. 554 (1990). Consequently, if the district has been ordered by a court not to release the information responsive to item 3, you must withhold it under section 552.107(2).

We are resolving this matter with an informal letter ruling rather than with a published open records decision. This ruling is limited to the particular records at issue under the facts presented to us in this request and should not be relied upon as a previous determination regarding any other records. If you have questions about this ruling, please contact our office.

Sincerely,



Michael Jay Burns
Assistant Attorney General
Open Records Division

MJB/ch

Ref: ID# 126541

Encl. Submitted documents

cc: Ms. Katherine Martinez-Vitela
Duff & Vitela
23 Meandering Way, Suite B
Round Rock, Texas 78664
(w/o enclosures)